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JUDICIAL NOTICE AND THE LAW OF EVIDENCE.

IN considering the subject of judicial notice one has to beware of a common misconception. Very often it is supposed that there is but one question where in reality there are two, viz.: (*a*) the question whether the tribunal can assume a certain fact without proof, and (*b*) the question what it can do with it when it is assumed. Just as in applying the law of evidence,[1] there is no propriety in giving evidence of that which would not be available if it were in, and so in common legal language much is said not to be admissible which would be admitted if it had any bearing upon the case, so, in regard to judicial notice, there is much which in any given case would readily be noticed without proof if it could be applied to the purpose desired, but which is refused notice for the reason that the fact would be of no legal significance if it were recognized. Judges, in presiding over litigation, are not engaged in a philosophical investigation or an academic exercise; with them the search for truth is but an incidental matter and not the main one, and their ability to use a fact when it is proved or admitted or assumed is limited by the requirements of their main business, which is that of awarding justice,—awarding it according to the rules of law and under established usages and forms. That familiar instrument of justice, the doctrine of estoppel, often makes the actual truth of fact unimportant

[1] 3 Harv. Law Rev. 147.

in a particular case; and in all cases the chief question for a judge is, not what is the actual truth of fact, but what is it lawful and just for him to take to be true for the purposes of the particular case then before him. Often, therefore, when a court is understood to declare that it cannot notice a fact without proof, what it really says is not this, but that it cannot hold a certain allegation in pleading to be sufficient, or a certain finding in a special verdict or an officer's return to be full enough, or a certain contract to be binding, or a certain piece of property to belong here or there.

After allowing for all this, however, there are yet many cases where the question is fairly presented of the power or the duty of a court to take cognizance of some matter without proof. The maxim that *manifesta* (or *notoria*) *non indigent probatione* may be traced far back in the civil and the canon law; indeed, it is probably coeval with legal procedure itself. We find it as a maxim in our own books,[1] and it is applied in every part of our law. It is offset by another principle, also very old, and often overtopping the former in its importance, — *non refert quid notum sit judici, si notum non sit in forma judicii*.[2] These two maxims seem to intimate the whole doctrine of judicial notice,—a doctrine which has two aspects, one regarding the liberty which the judicial functionary has in taking things for granted, and the other the restraints that limit him.[3]

What is this doctrine of judicial notice, and whereabout in the

[1] 7 Co. 39 a–39 b; 11 Co. 25.

[2] Coke, C. J., quotes this from Bracton, in an action of slander, Crawford, *v.* Blisse, 2 Bul. 150 (1613), to support the overstrained doctrine of that day about taking the words charged *in mitiori sensu*.

[3] The expression "to take notice of" anything, in our ordinary popular phraseology, imports observing or remarking it. In the legal language of to-day to "take notice" has a meaning correlative to that of giving notice; viz., that of a man's accepting or charging himself with a notification, or with the imputation of knowledge of a thing. But the import of the legal expression to "take judicial notice," as indicating the recognition without proof of something as existing or as being true, seems traceable rather to the older English usage. The word "notice" was formerly often used interchangeably with knowledge, and with our legal term "conusance." In the English of our Bible we read: "Wherefore have we afflicted our souls and thou takest no knowledge?" (Isa. lviii. 3.) "They took knowledge of them that they had been with Jesus." (Acts iv. 13.) So we find in the Norman French of our old reports the expressions "take notice" and "take conusance;" and when the reports begin to be translated and published in English, in the seventeenth century and later, we find the phrase becomes interchangeably take notice, take knowledge, and take conusance.

law does it belong? In trying to answer these questions, I propose first to deal briefly with the second one; then to present a number of cases which may furnish illustration, as well as a test and a basis of judgment as regards both questions; then to consider briefly the sort of thing of which courts will take notice without proof, distinguishing also the case of juries; and finally to mention a few discriminations which it is important to keep in mind if one would make an intelligent application of the doctrine.

I. Whereabout in the law does the doctrine of judicial notice belong? It does not belong peculiarly to the law of evidence. It does, indeed, find in the region of evidence a frequent and conspicuous application; but the habit of regarding this topic as a mere title in the law of evidence tends to obscure the true conception of both subjects. That habit is quite modern. The careful student will notice that a very great proportion of the cases involving judicial notice raise no question at all in the law of evidence; they relate to pleading, to the construction of the record or of other writings, the legal definition of words, the interpretation of conduct, the process of reasoning, the regulation of the order of trials. In short, the cases relate to the exercise of the function of judicature in all its scope and at every step. The nature of the process as well as the name of it find their best illustration in some of the older cases, long before questions in the law of evidence engaged attention. We are the less surprised, therefore, to find that it was not until Starkie printed his book on evidence, in 1824, that any especial mention of this subject occurs in legal treatises on evidence, and that Starkie has very little to say about it.[1] The subject of judicial notice, then, belongs where the general topic of legal or judicial reasoning belongs,—to that part of the law which defines among other things, the nature and limitations of the judicial function. It is, indeed, woven into the very texture of this function. In conducting a process of judicial

[1] Stark. Ev. i., 400–405. Bentham, to be sure, in his "Rationale of Judicial Evidence" (which was not a law book), composed in 1802–1812, and published partly by Dumont in 1823, and in full under the editorship of John Stuart Mill in 1827, had briefly discussed the question (Works, vi. 276, book i. c. 12,) how far a judge can pass on questions of fact without "evidence." He concludes, *inter alia*, that a judge should be allowed "at the instance of either party to pronounce, and, in the formation of the ground of the decision, assume, any alleged matter of fact as notorious," subject to the right of the other party to deny the notoriety and call for proof.

reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved.[1]

II. Let me now illustrate the subject by a number of classified cases drawn from all periods of our law.

1. Certain cases relating to pleading and other matter of record. In looking at these the reader will find constant illustration of what has already been indicated, that the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, of stating them, and of conducting them. If formal words are necessary, like "felonice," and "murdravit," and "burglariter," in the old private appeals and in indictments, you must use them. If a certain form of action is necessary, you must resort to it. If a certain order or time of presentation be necessary, you must conform to it. If, as regards the fulness of detail or the precision of allegation, there be any rule of "certainty," you must conform to that. If there be any rule of the substantive law as to what con-

[1] Stephen (Dig. Ev., 1st and 2d ed., Ch. VII.) originally dealt with judicial notice under the general head of "Proof" and the special head of "Facts which need not be Proved." For this he was taken to task by an acute critic (20 Sol. Journal, 937), who suggested that since Stephen's art. 93, relating to the burden of proof, declares that whoever desires a judgment as to any legal right depending on the existence or non-existence of facts which he asserts, "must prove that those facts do or do not exist;" and since art. 59 (about judicial notice) declares that some facts asserted by a party need not be proved by him,—the true place for this last was that of an exception to the art. 93. This led Stephen, in his third edition, to change the special head of Ch. VII. from "Facts which need not be Proved" to "Facts Proved Otherwise than by Evidence" (his definition of "evidence," art. 1, being (*a*) the statements of witnesses in court, and (*b*) documents produced in court), and called forth certain remarks in the preface to the third edition (Little & Brown's ed. (1877) 26): "By proof I mean the means used of making the court aware of the existence of a given fact; and surely the simplest possible way of doing so is to remind the court that it knows it already. It is like proving that it is raining by telling the judge to look out of the window. It has been said that judicial notice should come under the head of burden of proof; but surely this is not so. The rules as to burden of proof show which side ought to call upon the court to take judicial notice of a particular fact; but the act of taking judicial notice, of consciously recalling to the mind a fact known, but not for the moment adverted to, is an act of precisely the same kind as listening to the evidence of a witness or reading a document: that is, it belongs to the general head of proof." As regards all this, one or two things may be briefly remarked: (*a*) "The general head of proof," and "the means used of making the court aware of the existence of a given fact," include the whole topic of legal reasoning: they spread far beyond the law of evidence. The same reach belongs to the burden of proof. So that both Stephen and his critic recognize the wide scope of judicial notice. (*b*) It seems a very inadequate conception of the subject of

stitutes the actionable or punishable thing, or what is a defence, of course the pleadings and the record must come up to these requirements. Under this head may be put the following cases: (*a*) In 1332–3,[1] in a *quare impedit* against the Dean and Chapter of St. Peter's at York, the Dean made no appearance. Counsel stated that he was dead, and then: "Trewe.[2] Where notice comes that a man is dead you are not to go to judgment against him. It is a notorious thing that the Dean is dead, and, therefore, you should not go to judgment against him. Herle (C. J. C. P.). We cannot go to judgment upon a thing notorious, but only according to what the process before us is. Basset. A *quare impedit*, was brought against H. de Stanton,[3] and he died pending the writ, wherefore the writ abated. Herle. The writ was not abated by judgment, but the plaintiff waived his writ because he

judicial notice to speak of it as "a means of making the court aware" of a fact; it has to do not merely with the action of the court when the parties are seeking to move it, but when alone and acting upon its own motion. To read a document in court, or to listen to a witness there, is to deal with evidence." And so when an object is submitted to the judge's inspection in court. But the true conception of what is judicially known is that of something which is not, or rather need not, unless the tribunal wishes it, be the subject of either evidence or argument — something which is already in the court's possession, or at any rate is so accessible that there is no occasion to use "any means to make the court aware" of it; something which it may deal with quite unhampered by any rules of law. (*c*) There is sometimes confusion between judicial notice and inspection, or the dealing by a court with what Bentham calls "real evidence,"— a thing submitted directly to the senses of the tribunal; as in Stephenson *v.* The State, 28 Ind. 272 (1867), where the trial judge had decided the question whether the appellant was over fourteen years of age by simply inspecting him. He certified to the upper court that "as the defendant, being present in court, presented . . . the appearance of a full-grown man, such proof [*i.e.*, other evidence] was not required." Of course this was merely an instance of settling a question by the use of a certain sort of evidence,— and it may be added that it was, at common law, a very familiar way. But the upper court describe the situation as one where "no proof whatever was offered as to the age of the defendant." "The judge was not a witness, and the State is not entitled to avail itself of his knowledge, except upon matters of which the court takes judicial notice." The real ground of the court's decision here (granting a new trial) appeared to be that when a jury or trial judge decides a question of fact in this way, a party loses the benefit of his exceptions, because there is no way of presenting the evidence to an appellate court in such a manner as to enable it to judge of "the reasonableness of the impression" made upon the mind of the lower tribunal. We may agree that this case was rightly decided, without assenting to the court's conception of what took place at the trial, or their view that it is impossible to have the full benefit of exceptions when the trial court avails itself of "real evidence." Stephen's illustration of "proving that it is raining by telling the judge to look out of the window," is another instance of the use of real evidence.

[1] Y. B. 7 Ed. III. 4, 7.

[2] *Semble*, Simon de Trewethosa, a sergeant of the period.

[3] Herle's predecessor as Chief Justice of the Common Pleas.

knew that he was dead." (*b*) In 1456,[1] in a *quare impedit*, the declaration related to a church in Wales, and the writ was brought in the County of Hereford. Littleton, for the defendant, objected that the plaintiff had not stated, either in his account or his writ, that Hereford adjoined Wales, and the law required that the action should be brought in a county adjoining. But the court held with the plaintiff, who insisted that "*prima facie* it will be intended that the County of Hereford adjoins Wales until the contrary is alleged; if the defendant would take advantage of this, he should allege that the County of Hereford is not adjoining, or otherwise it will be taken that it is." (*c*) In 1552–3[2], in an action of debt upon a statute the defendant demurred to the declaration for misreciting the statute as being of the 32 H. VIII., while in truth it was of the 33 H. VIII. Saunders, for the plaintiff, argued: "You Judges have a private knowledge and a judicial knowledge (un pryuate scyence et un iudyciall scyence), and of your private knowledge you cannot judge. . . . [And then he recites the story of Gascoigne and Henry IV., in Y. B. 7 H. IV. 41 (*infra*, p. 296), adding:] But there he could not acquit him and give Judgment of his own private knowledge. But where you have a judicial knowledge, there you may, and you may give judgment according to it. As if one be arraigned upon an Indictment for an offence which is pardoned by Parliament, there you ought not to proceed in it nor give judgment if he is found guilty, because it appears to you by your judicial knowledge that you ought not to arraign him. For the Judges ought to take Notice (prender conusance) of Statutes which appear to them judicially, although they are not pleaded; and then the misrecital of that whereof the Judges ought to take Notice without Recital is not material." But the court held that while the plaintiff need not recite the statute "because it is a general statute, and extends to every one of the King's subjects, and the Justices are bound to take notice of it, . . . [yet] the court should abate for the Misrecital. . . . For Declarations ought to have two things; the first is certainty, in order that the defendant may know what he is to answer to; . . . the other thing . . . is truth. . . . In our case he

[1] Y. B. 35 H. VI. 30, 35.

[2] Partridge *v.* Strange, Plow. 77, 83–84. I quote some of the original phrases in this case. It will be remembered that Plowden was published in French in 1571, and that the first translation appeared in 1761.

has grounded his Action upon a Statute by him recited, where it appears to us judicially that there is no such Statute made at that Time." Here the court was called upon to take judicial cognizance of the date of a statute, and they did it; but they were restrained from giving the plaintiff the benefit of their knowledge by a rule of pleading.

(*d*) In 1588–9,[1] in an action of ejectment, there was a special verdict which set forth the founding of a hospital by the name of the Master and Chaplains of the Hospital of Henry the Seventh late King of England of the Savoy, and that afterwards the said master and chaplains being seized, etc., leased the same to the defendant by the name of W. H. Master of the Hospital . . . called the Savoy. And afterwards by their true name they leased the same to Thomas Fanshawe the plaintiff's lessor, and the question was whether the lease to the defendant by the name above stated was good.[2] The ground upon which the judges went who decided the case in the Exchequer of Pleas, and also those who agreed with them in the Exchequer Chamber, seems to have been that a very high degree of "certainty" was required in such a case.[3] The case is here cited mainly for the high-strung reasoning of Coke in arguing for the plaintiff, in the Exchequer Chamber, against the lease: "If the Name given to this Hospital upon the foundation of it and the Name usurped in the lease be not unum in sensu (not in your private understanding as private persons, but in your judicial knowledge upon the Record, quod coram vobis residet as Judges of Record) then this lease is void. For although you as private persons, otherwise than by Record know that the Hospital of Savoy and the Hospital vocat. le Savoy are all one Hospital, you ought not upon that your private knowledge to give judgment, unless your judicial knowledge agree with it; that is, the knowledge which is out of the Records which you have before you. But if the name given upon the Foundation and the usurped Name be

[1] Marriot *v.* Pascall, 1 Leon. 159; S. C. *sub nom.* Mariot *v.* Mascal, 1 And. 202, and *sub nom.* Fanshawe's Case, Moore, 228.

[2] This case was hard fought; in the Exchequer of Pleas it was held (Manwood, C. B., dissenting in a long opinion, preserved in Moore's Reports) that the lease was bad. In the Exchequer Chamber the court discussed it without giving judgment, and were divided in opinion; the full opinion of Anderson (C. J. C. P.) is found in his reports. But the case was finally settled by the parties.

[3] See the quaint, pedantic discourse of Anderson, C. J., on words and names, in his long opinion in 1 And. 208–220.

not idem sensu in your judicial knowledge, and you cannot otherwise conceive the identity of these two Hospitals nor make any construction to imagine it but by the Record, for the Record is your eye of Justice, and you have no other eye to look unto the cause depending before you but the Record, and to this purpose he cited the case of 7 H. 4, 108, [*sic*, but meaning probably 7 H. 4, 41, which is thereupon inaccurately stated] . . . so in our case, it may be that you in your private knowledge know that the Hospital de la Savoy and the Hospital vocat. le Savoy is all one; but that doth not appear unto you upon the Record which is before you, but it may be for anything that appears in the Record, that they are diverse and several Hospitals. Therefore the lease is void."[1]

(*e*) In 1611[2] an indictment alleged an arrest at London on 18 November "between the hours of five and six in the afternoon." It was contended that the arrest was illegal as being in the night, *i.e.*, after sunset; but the court ("all the Judges of England and Barons of the Exchequer") "resolved that although in truth between five and six o'clock in November is part of the night, yet the Court is not bound ex officio to take conusance of it, no more than in the case of burglary without these words, in nocte . . . or noctanter."[3]

(*f*) To these may be added a class of cases where the courts, for the purposes of a particular kind of action, refused to give effect

[1] To all this learned triviality add that of Manwood, C. B., in supporting the case of the defendant against another objection, viz., that the lease was bad as omitting the word late (nuper), in the designation of King Henry VII. It is intended, he says, that he who speaks of King Henry VII. speaks of the late king of that name, "Just as the Dean and Chapter of Carlisle was incorporated by the name of the Dean and Chapter of the Holy and undivided Trinity, of Carlisle; and in the lease they omit undivided, yet was it good enough . . . and the reason was because by the name of the Trinity the word undivided is as strongly intended as if it were expressed; for everybody knows that the Trinity is undivided, and so in 36 H. 6 the foundation was the Church of St. Peter and Paul the Apostles, and the lease omitted the Apostles, and yet good, for it is intended in the plea, and all know that Peter and Paul were Apostles. So also the lease is good where the foundation is of the blessed Virgin Mary and Virgin is omitted; yet it is good, for all men well know that Mary was blessed and a Virgin."

[2] Mackalley's Case, 9 Co. 65 a, 67; ib. 62.

[3] The phrases here are probably those of the first English edition of these reports in 1658, long after Coke's death in 1633. He published his reports in Norman French. The ninth book appeared in 1613, and the passage above quoted (not to quote it all) reads in the French: "Le court nest tenus ex officio a prender conusance de ceo nient pluis que in case de burglarie sans ceux paroles in nocte eiusdem diei, or noctanter." In Trotman's "Epitome" of the first eleven books, published in 1640, this reads (p. 468), "Court nest ten p prend notice," etc.

to the ordinary meaning of words, and persisted for many years in considering only whether they were susceptible of some other meaning. Actions for defamation, a slip transplanted from the popular and ecclesiastical courts, started into such a savage luxuriance of growth in the king's courts, in the sixteenth and seventeenth centuries, that the judges appear to have been frightened at it.[1] At any rate, for many years they did their best to discourage the action by applying a rule that the words should be taken *in mitiori sensu*. For example, it was held that it was not actionable as imputing crime to say of another,[2] "Thou hast stolen by the highway side," for it might be taken that he came unawares upon some one by the highway, or that he stole a stick under a hedge; or to say,[3] "Holt struck his cook on the head with a cleaver and cleaved his head; the one part lay on the one shoulder and another part on the other," for "the party may yet be living, and it is then but trespass;" and again, in 1615–16,[4] where one was charged with saying of another, "Thou art a Thief, for thou hast stolen me (Defendant innuendo) a hundred of slatte," it was held not actionable. The plaintiff's counsel in vain urged that this form of expression was "le usuall phrase del paies;" Coke, C. J., answered that he should have averred it, "otherwise we cannot take notice of it, for I do not know that it is a usual phrase in the country. It seems to me that the words are insensible, for it is clear that the first words are not actionable, scil., 'thou hast stolen me,' for it is not felony to steal a man, although it is to steal some women." At Easter, in 1616, plaintiff's counsel again brought up the case and said "ceo est un usuall phrase, come en le Scripture, Fetch me a kidd from the Flock."[5] Doderidge, J.: "That is *for* me, and not

[1] See Professor Maitland's admirable little paper on "Slander in the Middle Ages," in The Green Bag, ii. 4 (January, 1890). In 1671, even, we find Vaughan, C. J., saying, in King *v.* Lake (2 Ventris, 28), in an action of slander: "The Growth of these Actions will spoil all communications; a Man shall not say such an Inn or such Wine is not good. Their Progress extends to all Professions. . . . The Words spoken here have no more Relation to the Plaintiff's Profession, than to say of a Lawyer he hath a Red Nose, or but a little Head." Vaughan was dissenting.

[2] Brough *v.* Dennison, Goldsborough, 143, 58 (1601).

[3] Holt *v.* Astgrigg, Cro. Jac. 184 (1607).

[4] White *v.* Brough, 1 Rolle, 286.

[5] Shakespeare had just died, almost on the first day of this very Easter term. Would Coke, we may wonder, have recognized Prince Henry's description of Hotspur, "He that kills me some six or seven dozen of Scots at a breakfast," or the many other like phrases that are now so familiar to us,— "Rob me the exchequer," "He smiled me in the face," "How this river comes me cranking in," and the like?

from me." The counsel urged that either way was good enough for him. Doderidge: "It is uncertain how it should be taken, and therefore the action lies not, for the discredit of such actions; and judgment was given accordingly against the plaintiff."

(*g*) And again, under this head belong such cases as that of Taylor *v.* Barclay,[1] where, on a demurrer to a bill in equity which alleged that the British Government had recognized the independence of the Federal Republic of South America, the Vice-Chancellor, having informed himself at the foreign office that this was not true, took judicial notice of the fact, and declined to hold that what was thus known to the court to be a false allegation had been admitted by the demurrer to be true.

2. A second class of cases relates merely to the construction of writings or the interpretation of words. Here the courts take notice of the ordinary meaning of words, and, as some of the cases of slander already cited may indicate, they formerly took judicial notice, not merely, as now, of the general meaning, but also of the local use of language.[2] (*a*) In 1536,[3] in holding good the condition of a bond to pay seven pounds to the obligor's own wife, Fitzherbert, J., says: "The meaning and intent of the parties shall be taken; for I have seen this case adjudged. Two made a contract for eighteen barrels of ale, . . . and the buyer would have had the barrels when the ale was gone; adjudged that he should not, because it is commonly used that the seller should have them, and it was not the intent of the parties that the buyer should have the barrels but only the ale. Suppose I make a covenant with you that if you come to my house I will give you a cup of wine; if you come you shall not have the cup, for it cannot be intended (entend) that my intent was to give you the cup." (*b*) In 1611,[4] on the defendant's demurrer, in an action of debt on a bond, — in passing upon the meaning of these words in the condition, — "which should be levied," Fleming, C. J., laid it down that, "as touching construction of words they shall be taken according to the . . . intent of parties, . . . and this intention and construction of words shall be taken according to the vulgar and usual sense, phrase, and manner of speech of these words and of

[1] 2 Sim. 213 (1828)

[2] See McGregor *v.* Gregory, 11 M. & W. p. 295.

[3] Y. B. 27 H. VIII., 27, 12.

[4] Hewet *v.* Painter, 1 Bul. 174.

that place where the words are spoken." In this case there was no averment that the words had any peculiar local meaning; the argument of counsel was in the terms adopted by the court and just quoted, and he illustrated thus: "As in Lincolnshire where eight strikes make a bushel, the judges of the common law are for to take notice of particular usages in several places, as of London measure in buying of cloth there." (*c*) And so in 1613 and 1623,[1] in actions on the case (1) for not delivering "20 Cumbos tritici," "though it is not avowed by any Anglice quid est Cumbos, yet the court ought to take notice thereof, being the Phrase of the Country of Norfolk and Suffolk and other Places, and there well known;" (2) upon a sale of "quosdam Carrucas signatas, Anglice Car-rooms, though it is not averred what is intended by the Word Car-rooms, nor what it signifies, yet the Declaration is good; for it is a Phrase in London well known, of which the Court ought to take notice, this being a Phrase of the country."[2] (*d*) In the case of Hoare *v.* Silverlock,[3] where, in an action for libel, in saying of the plaintiff in a newspaper that certain persons dealing with her "had realized the fable of the Frozen Snake," after a verdict for the plaintiff the court declined to arrest the judgment. Lord Denman remarked: "We are not called upon here to take judicial notice that the term 'Frozen Snake' had or had not the meaning ascribed to it by the plaintiff, but to say, after verdict, whether or not a jury were certainly wrong in assuming that those words had the particular meaning."[4]

It would be idle to add to this class of cases. Nothing is more familiar than the spectacle of courts construing wills, deeds, contracts, or statutes upon their own knowledge of the import of words.[5]

3. The last class of cases which I shall name relates to various miscellaneous duties of the court. (*a*) In 1302[6] (among cases tried

[1] Rolle's Ab Court C. 6, 7.

[2] "By Car-rooms," adds Rolle, "is intended a Mark which the Lord Mayor puts upon a Cart."

[3] 12 Q. B. 624 (1848).

[4] Of the same character is the case of Capital and Counties Bank *v.* Henty, 7 App. Cas. 741, where the question was presented in a similar way, but the judgment was arrested.

[5] Nelson *v.* Cushing, 2 Cush. 519, 533; Atty.-Gen. *v.* Dublin, 38 N. H. 459, 513; Meyer *v.* Arthur, 91 U. S. 570; Tindal, C. J., in Shore *v.* Wilson, 9 Cl. & F. p. 569; Bowes *v.* Shand, 2 App. Cas. 455; Towgood *v.* Pirie, 35 W. R. 729; Union Pac. R. R. Co. *v.* Hall, 91 U. S. 343.

[6] Y. B. 30 and 31 Ed. I. 256.

at the Cornish Iter), in an assize of novel disseisin brought by John de Botton against John de Wilton and others, a plea in abatement for misnomer was put forward, and was promptly allowed. "Westcot. Sir John answers and says that his name is John de Willington; judgment of the writ, . . . Hunt. known by this name; ready, etc. Brompton, J. He is known through all England as Willington and by no other name, and that well know we; and therefore as to John you shall take nothing by your writ." This was giving judgment upon a point of ordinary fact as being notorious. (*b*) In 1406,[1] in a discussion over arresting judgment on the ground that the facts appeared of record to be otherwise than as the jury had found, Gascoigne (C. J. K. B.) said: "Certainly if I had been sworn on the same inquest I should, upon the evidence shown on the King's part, have found for him (*i. e.*, against the actual verdict). Tirwhit. Sir, suppose a man killed another in your presence and actual sight, and another who is not guilty is indicted before you and found guilty. You ought to respite the judgment against him, for you know the contrary, and to inform the King, that he may pardon (faire grace). No more in this case. . . . for you are apprised of the Record. . . . Gascoigne. Once the King himself questioned me as to this case which you put, and asked me what the law was; and I told him as you say. And he was well pleased that the law was so." (*c*) A well-known set of cases has to do with the calendar and certain sorts of facts ordinarily given in almanacs. When the books talk about "the calendar," they refer sometimes to the mere order and arrangement of days, and especially saints' days and ecclesiastical feasts, by which the terms and days of court were regulated; and sometimes to the books or written or printed tables in which this order was set down. The courts almost of necessity recognized without proof the established order and arrangement of days, and the phrase was that "the calendar was part of the law of England," and so of "the almanac." Moreover, in the multitude and multiplication of saints and saints' days, and the intricacies attending upon the notion of movable feasts, and the arrangement of the Council of Nice regulating Easter by the relation of the moon to a certain date in March, it was no easy matter to find out the details of the calendar for any given year; so that the courts were assisted by written and

[1] Y. B. 7 H. IV. 41, 5.

printed tables of more or less authority. In the Black Book of the Exchequer[1] there is preserved a calendar and a list of dominical letters, dating back, perhaps as far as 1187. This may well have been the official memorandum of the Exchequer. Since the courts found it convenient or necessary to rely upon such tables, the notion of taking judicial notice of the order of days was easily transferred to the table which set it forth. In 1493-4,[2] a question arose on a writ of error over the continuance of a case to the Monday before St. Boniface's day. There was only one St. Boniface in the "mertlage,"[3] and apparently only one was generally recognized; but two were in the printed calendar. The court finally held the continuance good. I give a translation of this early case in a note. It is curious as showing a very early reference in our reports to a *printed* calendar, and as showing the perplexity that such questions might cause at that period.[4]

[1] Bond's Handy Book of Dates, 68.

[2] Y. B. 9 H. VII. 14, 1.

[3] My friend Professor Child has helped me to the meaning of this word, which puzzled the Chief Justice in the case. It is what we call a "Lives of the Saints," a martyrology. See Ducange; "Martilagium et Martilegium;" also "Matrilogium;" "pro Martyrologium." The martyrs and confessors "are the chief names which appear in the list of Saints'-days and festivals of the Church." (Bond's Handy Book of Dates, 146.)

[4] "A writ of error was brought, and error was assigned that: One brought an action of debt in a court which was granted by patent, and had a day of continuance till Monday next before St. Boniface's day; and the defendant pleaded, . . . and on Monday next the defendant appeared, and found against him; and it was assigned for error that St. Boniface's day was past before the day given as Monday next before St. Boniface. In fact, there were two St. Boniface's days in the printed calendar, and in the mertlage only one Boniface. It was moved whether this be error or not. Kingsmil. Although there are not two Bonifaces in every book, if there be two Bonifaces, the continuance is good. There are two in the calendar; and so the continuance is good and will be referred to the Boniface who is to come and not the one passed. There are divers saints who are not in the calendar, and yet a continuance to such and such a day of such and such a saint is good if any such saint there be. As St. Swithin here at Winchester is not in the calendar, yet a continuance to this day is good; . . . for if the day be known there it is enough, though it be not in the calendar. (Which the justices agreed to.) They say (dicnt) that there are a hundred saints who are not in the calendar; people, also, here in the South do not recognize them; and yet the continuance to one of the days is good. Just so there are two Bonifaces, and the printed calendar proves it. Wherefore, etc. Huston [argued] to the contrary, and [said] in the mertlage there is only one. Hussey [C. J. K. B.] What do you mean by this *mertlage?* What is it? Huston. It is a calendar universal in the church of this realm, which priests are bound to keep, and no other (nient pluis); and although a new saint were canonized beyond sea, there is no reason why people are bound to recognize him; and so a continuance to such a saint's day is not good. So here, for in this realm there is only one Boniface, and whether there are [anywhere] two or not, I know not, but it seems not, for he is not in the mertlage. The

In 1704,[1] when a writ of inquiry was returnable *trvs Trinitatis* and was returned executed June 14, which was on Monday, the day after the return day, the court held that they must judicially take notice that *tres Trinitatis* was on a Sunday, and equally although it was not assigned for error on the record. "Holt, C. J.: At the Council of Nice they made a calculation movable for Easter forever, and that is received here in England and becomes part of the law; and so is the calendar established by act of Parliament. And can we take notice of a feast without telling what day of the month it is? Shall we take notice of it because you show it on the record and not when we see it as plainly without your telling?" There are also cases where courts judicially notice any common almanacs as accurate sources of information about such facts as the time of the setting and rising of the sun and moon; or rather, as it is more accurately put, these courts notice without proof the facts themselves.[2] (*d*) In Brown *v.* Piper,[3] on appeal in equity from a Circuit Court, where the plaintiff asked for an injunction to restrain the defendant from infringing a patent for preserving fish and other articles, the Supreme Court of the United States, having in this case the duty of passing upon facts as well as law, reversed a decree for the plaintiff on the ground that his invention lacked novelty. They adverted to a matter of fact which was nowhere mentioned in pleadings of proof. The patent was for preserving fish and other articles in a close chamber by a freezing mixture having no contact with the atmosphere of the preserving chamber. The Supreme Court called to mind something which

printed calendar is not to the purpose, and may be false; and maybe there are two Bonifaces beyond sea and only one in England. The judges sent to the Common Bench about the matter. Brian [C. J. C. B.] thought the continuance not good unless two Bonifaces were recognized in England and in the mertlage; or at least recognized, for the printed calendar is of no authority (ne dasc, aucthorit.). Vavisor [Justice of the C. B.] to the contrary. And we were in doubt (fuimus in doubt). And those in the King's Bench held the continuance good." I have followed an edition of 1597; the Maynard edition appears to have various misprints.

[1] Harvey *v.* Broad, 6 Mod. 159, s. c. ib. 196. "The Almanack to go by is that which is annexed to the Common Prayer-Book." Holt, C. J., in Brough *v.* Perkins, 6 Mod. 81 (1703). And see Tutton *v.* Darke, 5 H. & N. 647; Nixon *v.* Freeman, ib. 652. Now-a-days, in referring to the almanac, courts have as little thought of any particular edition as they have when they refer to the Bible or to Æsop's Fables.

[2] People *v.* Chee Kee, 61 Cal. 404; State *v.* Morris, 47 Conn. 179; Munshower *v.* The State, 55 Md. 11; *aliter* Collier *v.* Nokes, 2 C. & K. 1012.

[3] 91 U. S. 37.

is in all men's knowledge as being old, in daily use, and involving the same principle; viz., the common ice-cream freezer. Of this and of the preservative effect of cold, they said we take judicial notice, and will deal with it as if set up in the answer and fully proved. "We think this patent was void on its face, and that the court might have stopped short at that instrument, and without looking beyond it into the answers and testimony, *sua sponte*, if the objections were not taken by counsel, well have adjudged in favor of the defendant."

(*e*) Recently, the Court of Appeals of New York[1] reversed a judgment for the plaintiff, in an action for personal injuries received while in the defendant's service as a brakeman in passing through a tunnel on the top of a freight car. The height of the tunnel was considerably lessened in the interior of it by an arch not visible at the entrance, and of this lessening the plaintiff must be assumed to have had no notice. The injuries appeared to have come from striking the plaintiff's head against the arch. But his own testimony was that he was sitting when the accident happened, and the distance between the top of the car and the bottom of the arch was four feet and seven inches. The trial judge had left it to the jury that, "If the plaintiff was sitting down, it is for you to say whether his head would reach to that height." After verdict and judgment the defendants appealed, and the Court of Appeals put the question thus: "Whether we will accept that finding . . . or whether we will take judicial notice of the height of the human body and the measurements of its separate parts, and . . . reverse a judgment that is based upon a finding clearly contrary to the laws of nature." In proceeding to grant a new trial, the court take judicial notice that the average height of man is less than six feet, and the average length of the human trunk to the top of the head is less than three feet, and that men differ in height mainly from a difference in the length of their legs; that this plaintiff could not have struck his forehead against the arch while sitting, unless he were at least nine feet high, and that there is no authenticated instance in human history of any such height; that while the plaintiff may have been a tall man and the jury may properly have acted upon their inspection of him, "a fact so rare in the

[1] Hunter *v.* N. Y., O. & W. Ry. Co., 23 No. East. Rep. 9 (Dec. 1889).

course of nature should be made apparent, in some way, on the record." [1]

III. So far I have spoken of the court. As regards our modern jury, the same considerations apply to them; for now they also are judicial officers, bound to act only upon the evidence which is given to them under the eye of the judge. "A jury," says Mr. Justice Grier, speaking for the Supreme Court of the United States in 1850, "has no right to assume the truth of any material fact without some evidence legally sufficient to establish it. It is therefore error in the court to instruct the jury that they may find a material fact of which there is no evidence from which it may be legally inferred." [2]

Formerly this was not so. For centuries the jury used freely their private knowledge; it was their duty to do so. They did, indeed, exercise a judicial function,[3] but they were not restrained by the doctrine of judicial notice. The change in their character was a very gradual one. We may still read in the second edition, published in 1735, of the anonymous "Law of Evidence," [4] the doctrine about the jury which was stated in Bushell's case: "The law supposeth them to have knowledge of and capacity to try the Matter in Issue (and so they must), though no Evidence were given on either side in court; but to this the Judge is a Stranger; *i.e.*, he cannot Judge without Evidence, though the Jury may." But taking the jury as it stands to-day, it is a body which is bound to keep within the restrictions imposed upon courts by the principle of judicial notice; and also it has the same liberty which that principle allows to courts. No doubt, in the case of Brown *v.* Piper,[5] above named, it was the right and the duty of the lower court,

[1] It will be observed that the substance of this decision is merely that the justice of the case required a new trial, and we may suppose that the court had sufficient reason for thinking that the points here elaborated had not been duly considered. But the opinion has an aspect of nicety. Might not the brakeman justly have been regarded by himself and by the jury as "sitting," although at a given moment he was shifting his position, and so raising himself momentarily a foot or two above his sitting height? The tunnel at its entrance was more than four feet higher than the arch, and allowed him a good margin.

[2] Parks *v.* Ross, 11 How. 362, 373; and see Schmidt *v.* Ins. Co., 1 Gray, 529. This is a modern doctrine. A learned writer (Pike's Hist. Crime, ii. 368, 369) has even said that it is not found formally declared in our reports before 1816, by Lord Ellenborough in R. *v.* Sutton, 4 M. & S. 552.

[3] See, *e.g.*, Temple *v.* Cooke, 3 Dyer, 265 b.

[4] The earliest English treatise on this subject, originally published in 1717.

[5] 91 U. S. 37.

acting as it did without a jury, to deal with the generally known fact about ice-cream freezers in the way it was used by the Supreme Court. Equally true is it that if the same question had in any way come before a jury they should have done the same. The circumstance that the jury is a subordinate tribunal does not change the nature of their office; it merely subjects them in many of the details and particulars of their exercise of it to the direction of the judge. Accordingly we find it abundantly recognized in our law that juries are also within the range of the doctrine of judicial notice; as in Com. *v.* Peckham,[1] where on an indictment for the sale of intoxicating liquor the court below refused the defendant's request for an instruction that evidence of a sale of gin was not enough, without further evidence that gin was intoxicating; and this refusal was sustained on exceptions. "Jurors," said Mr. Justice Metcalf, " . . . are allowed to act upon matters within their general knowledge without any testimony on those matters."[2] On the other hand, the restraining operation of this doctrine was applied by the same court, a little later, to a question of the character of the witnesses.[3] The plaintiff in his closing argument appealed to the personal knowledge of some of the jury, that the general character of certain witnesses was "so infamously bad" as to make them unworthy of belief; but the trial judge instructed the jury that they could not act upon such knowledge unless it were testified in court; and this ruling was sustained. In all cases where a jury has to estimate damages and to act upon expert testimony, their power is recognized of bringing into play that general fund of experience and knowledge which in theory of law is always imputed to them. This was formally held in 1881 by the Supreme Court of the United States, in a case[4] where experts had testified to the value of a lawyer's professional services. And the court cited with approval a case in which Chief Justice Shaw,

[1] 2 Gray, 514.

[2] And he continued with that well-known flavor which gives character to his opinions: "Now everybody who knows what gin is, knows not only that it is a liquor, but also that it is intoxicating. And it might as well have been objected that the jury could not find that gin was a liquor without evidence that it was not a solid substance, as that they could not find that it was intoxicating without testimony to show it to be so. No jury can be supposed to be so ignorant as not to know what gin is. Proof, therefore, that the defendant sold gin is proof that he sold intoxicating liquor. If what he sold was not intoxicating liquor, it was not gin."

[3] Schmidt *v.* Ins. Co., 1 Gray, 529, 531, 535.

[4] Head *v.* Hargrave, 105 U. S. 45.

speaking of the question of damages in trover, remarked: "The jury may properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry. . . . The jury were not bound by the opinion of the witness; they might have taken the facts testified by him as to the cost, quality, and condition of the goods, and come to a different opinion as to their value." The operation of the same principle in supplementing evidence came out neatly in Bradford *v.* Cunard Co., 147 Mass. 55, where woollen goods of a certain value had been soaked or otherwise injured by salt-water and soda ash, and no admissible evidence was before the jury going to the precise amount of the damages; they fixed it at $500; and the court allowed this to stand, on the ground that they could not say but that the jury might, "as a matter of common experience," find the damage to be not less than the amount named. In R. *v.* Sutton[1] the refined doctrine seems to be put forward that a jury may be referred to their own knowledge of facts which have been sufficiently proved otherwise, in confirmation of this evidence.

At the end of this collection of instances illustrating the application of the doctrine of judicial notice, I may be permitted to repeat what they help to illustrate, that this topic has its proper place, not in the law of evidence or of pleading, or in any other particular department in our ordinary classification of the law, but in that part of it which is concerned with stating the nature of the judicial function and the limitations under which it has to be discharged; that any consideration which this subject can properly receive in treating other titles must be merely incidental; and, in particular, that in considering the law of evidence, the question of what the judicial tribunal may or must take knowledge of without evidence or argument, is on the same footing as the question of what one needs or does not need to prove in order to sustain any particular action. That is, indeed, something very necessary for one to know who would apply the law of evidence; but he must learn it elsewhere.

IV. What are the things of which judicial tribunals may take notice, and should take notice, without proof? It is possible to indicate with exactness only a part of these matters. Some things are thus dealt with by virtue of express statutory law; some in a

[1] 4 M. & S. 532.

manner that is referable merely to precedent, — to the actual decisions, which have selected some things and omitted others in a way that is not always explicable upon any general principle; others upon a general maxim of reason and good sense, the application of which must rest mainly with the discretion of the tribunal, and, in any general discussion, must rather be illustrated than precisely defined.

Courts, then, notice without proof: (1.) Things which are required by statute to be so noticed, as certain certificates, and attestations of the records and judicial proceedings of the States and Territories;[1] and certain volumes or printed sheets, purporting to be authentic records of law, whether domestic or foreign; and the like.[2] (2.) Whatever they have been accustomed to notice in this way, according to the established course of the common law and the practice of particular courts; as the authenticity of the signature, seal, and certificate of a notary public, when his certificate purports to be given in the discharge of his ancient international function of protesting foreign bills of exchange.[3] The recognition by courts of the international relations of their own country, of the great seal, of the names and official signatures and public acts of high public officials, past and present, and the like, may come under this head.[4] The administration of justice is carried on by the sovereign. The sovereign, in the lapse of time, has lost something of his concreteness, if he have not become a mere political expression. But when the king, long ago, sat personally in court, and, in later times, when judicial officers were in a true and lively sense the representatives and even mere deputies of the king, it was an obvious and easily intelligible thing that courts should notice without evidence whatever the king himself knew or did in the exercise of any of his official functions, whether directly or through other high officers. The same usages of the courts have continued, under the prevalence of legal and political theories very different indeed from those just mentioned; and it is not to be wished that these usages should change. Practical convenience and good sense demand an increase rather than a lessening of the number of the instances in

[1] Rev. St. U. S. s. 905; Pub. St. Mass. c. 169, s. 67.

[2] See 2 Tayl. Ev. s. 1527 for illustrations of this; Brady *v.* Page, 59 Cal. 52.

[3] Anonymous, Holt, 296, 297; Pierce *v.* Indseth, 106, U. S. 546.

[4] Wells *v.* Jackson Co., 47 N. H. 235.

which courts shorten trials, by making *prima-facie* assumptions of matters not likely, on the one hand, to be successfully denied, and, on the other, admitting readily of verification one way or the other if they be denied.[1]

It should be remarked, also, that some of the limitations upon the power of taking judicial notice of facts which are laid down in the books are only explicable upon the ground of precedent, and so are properly to be referred to this head of the established practice of the courts. It is said in English cases and in the text-books that the courts will notice the different counties, but not that any particular place is in a given county, or where it is.[2] Cases of this class often decide something quite different from the broad principle for which they are cited ; but in so far as any such doctrine as that last mentioned is true, it must rest merely on authority. The refusing to notice a well-known custom of London in Argyle and Hunt[3] is to be regarded in the same light.

(3.) Courts notice without proof all that is necessarily or justly to be imputed to them, by way of general outfit for the proper discharge of the judicial function ; and, as Lord Mansfield said of the underwriters and certain usages which they were bound to know:[4] "If they do not know them they must inform themselves." Such things are the ordinary usages and practice of their courts; the general principles and rules of the law of their jurisdiction ;[5] the ordinary meaning, construction, and use of the vernacular language ; the ordinary rules and methods of human thinking and reasoning ; the ordinary data of human experience and judicial experience in the particular region ; the ordinary habits of men.[6]

(4.) And then, finally, there is a wide principle, covering some

[1] In Peltier's Case, 28 State Trials, 616 (1803), Lord Ellenborough, in summing up to the jury, said: "That Napoleon Buonaparté was the chief magistrate and first consul of France is admitted. And that [France and England were at peace] is also admitted; and, indeed, they were capable of easy proof if they had not been admitted. Their notoriety seems to render the actual proof very unnecessary."

[2] Deybel's Case, 4 B. & Ald. 243; Brune *v.* Thompson, 2 Q. B. 789. But see *infra* 310-312.

[3] 1 Strange, 187.

[4] Noble *v.* Kennoway, 2 Doug. 510.

[5] In a great proportion of the cases that come before the United States courts they may and must take judicial notice of the laws of any State in the Union, as well as of the United States. Hanley *v.* Donoghue, 116 U. S. p. 6.

[6] "And Holt, Chief Justice, said, That the Way and Manner of Trading is to be taken notice of." Ford *v.* Hopkins, 1 Salk. 283. In Turley *v.* Thomas, 8 C. & P. 103, at nisi prius, the judge took notice of the [English] rule of the road, to turn to the near hand, and ruled that it applied to riding as well as driving.

things already mentioned, that courts may and should notice without proof, and assume as known by others, whatever, as the phrase is, everybody knows. The application of such a principle must, as I have said, leave a great range of discretion to the courts; only in a large and general way can any one say in advance what are and what are not matters of common knowledge. Some such things as the following may be laid down: Whatever a court will notice without proof it may state to the jury, or allow to be stated to it, without proof. Just as it is safe, and even necessary, to assume that juries, witnesses, counsel, and parties, as well as the court itself, all understand the ordinary meaning of language, and have enough capacity, training, and experience to conduct ordinary business and to understand it when it is talked about, so and upon like grounds it is assumed that they all know certain conspicuous and generally known facts, and are capable of making certain obvious applications of their knowledge. A knowledge of certain great geographical facts will be assumed, as that Missouri is east of the Rocky Mountains,[1] and that "such streams as the Mississippi, the Ohio, and the Wabash for some distance above its confluence with the Ohio, are navigable,"[2] but the point where they cease to be navigable is on a different footing. In Massachusetts it is lately held that a court may judicially notice that the Connecticut river, above the Holyoke dam, is not a public highway for foreign or interstate commerce.[3] Certain great facts in literature and in history will be noticed without proof; *e.g.*, what in a general way the Bible is, or Æsop's Fables, or who Columbus was; but as to particular details of the contents of these books or of Columbus's discoveries, it may well be otherwise. A knowledge will be assumed of the nature and effects of familiar articles of food or drink or ordinary use, and an infinite number of like matters. Illustrations of this abound in our books; some have already been given; let me add a few others. Where a tobacconist was indicted for illegally keeping his shop open on Sunday, and sought to bring himself within a statute which permitted "the retail sale of drugs and medicines," without any attempt to show that he sold tobacco as a medicine, or kept his shop open for the sale of it as such, this evidence was excluded, and the jury were charged that "keeping one's shop

[1] Price *v.* Page, 24 Mo. 65.

[2] Neaderhouser *v.* The State, 28 Ind. 257.

[3] Com. *v.* King, 22 No. East. Rep. 905 (November, 1889).

open to sell cigars on the Lord's Day" would support a conviction. In holding this construction right, the court (Knowlton, J.) say:[1] "Some facts are so obvious and familiar that the law takes notice of them. . . . The court has judicial knowledge of the meaning of common words, and may well rule that guns and pistols are not drugs or medicines, and may exclude the opinion of witnesses who offer to testify that they are. . . . We are of the opinion that cigars sold by a tobacconist in the ordinary way are not drugs or medicines, within the meaning of those words as used in the statute." In passing on the constitutionality of a prohibitory liquor law,[2] Comstock, J., in the New York Court of Appeals, laid it down as a basis of reasoning that "we must be allowed to know what is known by all persons of common intelligence, that intoxicating liquors are produced for sale and consumption as a beverage; that such has been their primary and principal use in all ages and countries. . . . It must follow that any . . . legislation which . . . makes the keeping or sale of them as a beverage . . . a criminal offence . . . must be deemed . . . to deprive the owner of the enjoyment of his property." On a like question in the Supreme Court of Indiana,[3] one of the majority of the court declared: "The court knows as matter of general knowledge, and is capable of judicially asserting the fact, that the use of beer, etc.,[4] as a beverage is not necessarily hurtful, any more than the use of lemonade or ice-cream." The Court of Appeals in New York,[5] in declaring unconstitutional an act prohibiting the manufacture of cigars and tobacco in tenement houses, said: "We must take judicial notice of the nature and qualities of tobacco. It has been in general use among civilized men for more than two

[1] Com. *v.* Marzynski, 149 Mass. 68; s. c. 21 No. East. Rep. 228 (1889).

[2] Wynehamer *v.* The People, 13 N. Y. 378, 387 (1855),

[3] Beebe *v.* The State, 6 Ind. 501, 519 (1855), and so Klare *v.* The State, 43 Ind. 483, declining to recognize judicially that common brewers' beer is intoxicating.

[4] This "etc." gives great possible enlargement to the doctrine. Coke's maudlin commentary upon Lyttleton's "&c" may be recalled. "Here is the first '&c' and there is no '&c' in all his three books . . . but it is for two purposes. First, it doth imply some other necessary matter. Secondly, the student may, together with that which our author hath said, inquire," etc., etc. And he goes on to catalogue a hundred and more of these pregnant symbols (Co. Lit. 17 *a*–17 *b*). As regards the "etc." in the text, the same court judicially knows that whiskey is intoxicating, and allows a jury to find it so upon their general knowledge (Carmon *v.* The State, 18 Ind. 450). The Supreme Court of Wisconsin (Briffitt *v.* The State, 58 Wis. 39) takes judicial notice that "beer," when the word is used alone, imports strong beer, and that such beer is intoxicating; *ahter* in the New York Court of Appeals, Blatz *v.* Rohrbach, 22 No. East. Rep. 1049 (Nov., 1889).

[5] Jacobs's Case, 98, N. Y. 98, 113 (1885).

centuries. It is used in some form by a majority of the men in this State, by the good and bad, learned and unlearned, the rich and the poor. Its manufacture into cigars is permitted without any hindrance, except for revenue purposes, in all civilized lands. It has never been said . . . that its preparation and manufacture into cigars were dangerous to the public health. We . . . are not able to learn that tobacco is even injurious to the health of those who deal in it, or are engaged in its production or manufacture."[1] So a court will notice, without pleading or proof, that a pile of lumber is likely to attract children to play about it;[2] that a freight car left in a highway is not likely to frighten horses of ordinary gentleness;[3] that photography is a proper means of producing correct likenesses;[4] what are the "nature, operation, and ordinary uses" of the telephone;[5] what is the meaning, upon a parcel, of C. O. D.;[6] that steamboats (first used in 1807) were in 1824 freely employed in transporting merchandise, and not merely passengers;[7] that a post-card is likely to be read by others than the one to whom it is addressed;[8] that coupon railroad tickets for a continuous journey over several different lines

[1] The judges sometimes cover a wide range in their reasonings, and take a very great deal for granted. See *e.g.*, the opinion of Chancellor Walworth on ale and beer, in Nevin *v.* Ladue, 3 Denio, 437; that of Chancellor Bland on trees and their mode of growth, in Patterson *v.* M'Causland, 3 Bland, 69; and that of Taney, C. J, on negroes, in Dred Scott *v.* Sandford, 19 How. 393.

[2] Spengler *v.* Williams, 6 Southern Rep. 613 (Miss. 1889).

[3] Gilbert *v.* R'y Co., 51 Mich. 488, a singular decision.

[4] Udderzook *v.* Com., 76 Pa. St. 340; Dyson *v.* N. Y. & N. E. R'y Co., 17 Atl. Rep. 137 (Conn. 1888), "not hitherto passed upon by this court."

[5] Wolfe *v.* Mo. Pac. R'y Co., 11 So. W. Rep. 49 (Mo. 1889).

[6] State *v.* Intoxicating Liquors, 73 Me. 278. "What is notorious needs no proof." Peters. C. J.

[7] Gibbons *v.* Ogden, 9 Wheat. 1, 220. Such questions relating to new inventions and new usages, must often be answered one way at one time, and in a different way later on. In *ex parte* Powell, 1 Ch. Div. 501, we find the English Court of Appeal declining to recognize without proof the existence of a certain custom in 1875, while in 1881, in Crawcour *v.* Salter, 18 Ch. Div. 30, the same court holds it to be now so well known that the courts must judicially notice it. For centuries our courts have noticed without proof what the term "o'clock," imports; but when we read (Black Book of the Admiralty, I. 313, note) that "hours of the clock are mentioned [in certain records] in this reign (Richard II.) for the first time, on March 8, 1390" we are reminded that there was a time, in the long annals of these courts, when they would have refused to take judicial notice of this novelty.

[8] Robinson *v.* Jones, 4 L. R. Ir. 391 (1879); and as to telegrams, Williamson *v.* Freer, L. R. 9 C. P 393 (1874). Post-cards containing certain objectionable matter are declared non-mailable by a statute of the U. S. of Sept. 26, 1888 (25 St. U. S. 496).

were in general use long before March 17, 1885, the date of a certain patent;[1] what the nature of the business of a mercantile agency is;[2] and that "habitual drunkenness" as a ground for divorce, and being a "habitual drunkard" as a ground for punishment, do not include habitual or common excess in the use of morphine or chloroform.[3]

V. Some discriminations should now be mentioned which ought to be attended to in applying the doctrine of judicial notice.

(1.) Sometimes the ultimate fact that is sought to be proved is noticed, and sometimes the thing noticed is the trustworthiness of a certain medium of proof, and not the thing itself which this tends to prove, as when a notarial seal and signature are taken without proof, or the certificate of a registrar of deeds or other public official. That is to say, the question sometimes concerns an evidential fact and sometimes an ultimate one; whichever it be, it is governed by the same principles. When the statutes of the United States[4] make Little & Brown's edition of the laws and treaties competent evidence of their contents "in all the tribunals and public offices of the United States and of the several States, without any further proof or authentication thereof," the courts are required to take notice of a certain medium of proof as being sufficient. Some of these contents — the public acts — are supposed to be known by the judges without calling for evidence of them; but even as regards these, their discretion in selecting and rejecting modes of proof is here restricted; they cannot reject these volumes. And when in an excellent case[5] it was held that although in our courts English statutory law is matter of fact to be pleaded and proved, yet a court will recognize printed books of statutes and printed reports of adjudged cases shown to the satisfaction of the court to be correct — "books of acknowledged or ascertained authority" — as competent evidence of the foreign law, we perceive the doctrine that the court may take judicial notice of a certain means of proving a fact when it cannot take notice of the fact itself.[6] The doctrine that almanacs may be referred to in order to ascertain

[1] Eastman *v.* Chic. & N. W. R'y Co., 39 Fed. Rep. 552 (C. C. N. D. Ill. 1889).

[2] Eaton Co. *v.* Avery, 83 N. Y. p. 34.

[3] Youngs *v.* Youngs, 22 No. East. Rep. 806 (Ill. 1889); Com. *v.* Whitney, 11 Cush. 477.

[4] R. S. U. S. s. 908.

[5] The Pawashick, 2 Lowell, 142.

[6] And so in Ennis *v.* Smith, 14 How. 426–430.

upon what day of the week a given day of a month fell in any year, to learn the time of sunrise or sunset, and the like, and that, in order to prove facts of general history, approved books of history may be consulted, may also be regarded as illustrating the taking notice of the authenticity of evidential matters, — of certain media of proof.[1] But in such cases the truth often is that the court takes notice of the fact itself which these books authenticate; and wherever that is so, a court may refer to whatever source of information it pleases, — the statement that it may consult an almanac or a general history being only an unnecessary and misleading specification of a particular sort of document that may be examined.[2]

(2.) It is to be observed that much is judicially noticed without proof, of which the court at a given moment may in fact know nothing. A statute may have been passed within a few hours or days, and be unknown to the court at the trial; or a given fact as to the international relations of the government may not be in fact known, as in Taylor *v.* Barclay, before cited,[3] where the judge informed himself by inquiring at the foreign office; or the general meaning of language, where the expression was used in a document of many years ago, may not be known to the court without private study and reflection.[4] In such cases not only may a court, as indeed it must, avail itself of every source of information which it finds helpful, but also, for the proper expedition of business, it may require help from the parties in thus instructing itself.[5]

(3.) Taking judicial notice does not import that the matter is indisputable. It is not necessarily anything more than a *prima-facie* recognition, leaving the matter still open to controversy. It is true that as regards many of the things which are judicially noticed, it cannot well be supposed that they admit of question; *e. g.*, that Missouri is east of the Rocky Mountains, and

[1] R. *v.* Holt, 5 T. R. 436; R. *v.* Withers, ib. 446; Dupays *v.* Shepherd, Holt, 296.

[2] Gardner *v.* The Collector, 6 Wall. 499; State *v.* Morris, 47 Conn. 179; People *v.* Chee Kee, 61 Cal. 404. In this last case the almanac used was an ordinary medical advertising almanac, Dr. Ayer's. And so in Quelch's Case (14 State Trials, 1083) counsel says, "We shall now (though there be no necessity for it) prove that . . . at the time . . . her sacred majesty and the King of Portugal were entered into a strict alliance," etc. "Upon this [goes on the report] two London Gazettes . . . were produced and two paragraphs were read."

[3] 2 Sim. 213.

[4] Atty.-Gen. *v.* Dublin, 38 N. H. 459.

[5] School Dist. *v.* Ins. Co., 101 U. S. 472; Steph. Dig. Ev., art. 59.

that Hereford borders on Wales; but the doctrine is by no means limited to that class of questions. A seal which purports to be the great seal of any State may in fact not be genuine, and so of the certificate and seal of any public official. A sale of tobacco and cigars may be made for medical purposes, although ordinarily it is not. In very many cases, then, the taking judicial notice of a fact is merely presuming it, assuming it until there shall be reason to think otherwise. Courts may judicially notice much which they cannot be required to notice. That is well worth emphasizing, for it points to a great possible usefulness in this doctrine in helping to shorten and simplify trials; it is an instrument of great capacity in the hands of a competent judge, and is not nearly as much used, in the region of practice and evidence, as it should be. This function is, indeed, a delicate one;[1] if it is too loosely or ignorantly exercised it may annul the principles of evidence and even of substantive law. But the failure to exercise it tends daily to smother our trials with technicality, and monstrously lengthens them out.

(4.) Another thing should be observed, which often escapes attention, viz., that the thing of which a court is asked to take cognizance without proof is often a totally different matter from what it appears to be; so that their refusal is misconceived and misquoted. Thus, in Phillips on Evidence,[2] one reads that "the courts . . . will not take notice . . . of any particular city; as, for instance, that Dublin is in Ireland," citing Kearney *v.* King, 2 B. & Ald. 301. But that case decides no such thing; the question was whether a declaration in assumpsit on a bill drawn at Dublin for a certain number of pounds, etc., without any averment to show the facts that it was drawn in Ireland and for Irish currency, could be read as importing those facts, and it was held that it could not. "It is not possible," said Abbott, C. J., "for the court to take judicial notice *that there is only one Dublin in the world.*" Again, where a suit was brought in Texas on a promissory note payable at New Orleans, and no averment that this New Orleans was in Louisiana, the defect was supplied by other matter upon the record; but the court thought that they could not

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[1] Cum multa putentur notoria quæ revera notoria non sunt, prospicere debet judex ne quid dubium est pro notorio recipiat. Calvinus (A.D. 1600) sub probatio.

[2] I. 466 (10th Eng. ed.); c. X. s. 1, end.

judicially know that the note was payable in Louisiana.[1] Everybody in this country knows, to be sure, or may know for the asking, that there is a New Orleans in Louisiana; but few could say whether there be not another New Orleans in another State, or in a dozen of them. In like manner in an English case,[2] on a motion to set aside the service of a summons as not conforming to a statute which required the indorsement on it of the name and place of abode of the attorney suing it out, the actual indorsement was, "Featherstone buildings, Holborn, in the County of Surrey;" and the objection was that, upon the face of it, it was irregular, as it was well known that this place and street were in Middlesex and not in Surrey. But Wightman, J.: "I cannot take judicial notice that there is no such place in the County of Surrey."[3] Another case,[4] in which an English court is generally quoted as refusing to recognize without evidence that the Tower of London is in London, may illustrate the need of scrutiny and discrimination before accepting such paradoxical statements. The case was on a rule for setting aside a nonsuit and giving a new trial, which was, in fact, made absolute on paying costs. But the court refused to do this, as of strict right, and to say that the court below ought to have taken notice without proof that a certain part of the Tower of London was in the city of London instead of being in Middlesex. The point turned upon the fact, that although much of London is in the County of Middlesex, yet much of it, for judicial and political purposes, is not; and the line was said to pass through the Tower.[5] The decision, therefore, is merely that a court is not required to take notice without proof of the precise boundary line of a county; a very different thing from holding that they cannot and should not take notice without proof that an object admitted to be the famous Tower of

[1] Andrews *v.* Hoxie, 5 Tex. 171. This case was cited by the court in Ellis *v.* Park, 8 Tex. 205, to support the holding that they could not take judicial notice that "St. Louis, Mo.," meant St. Louis in Missouri; but that was a very different thing, and, as it seems, indefensible. Price *v.* Page, 24 Mo. 65.

[2] Humphreys *v.* Budd, 9 Dowl, 1000.

[3] And so Bayley, J., in Deybel's Case, 4 B. & Ald. p. 246.

[4] Brune *v.* Thompson, 2 Q. B. 789.

[5] "This," says Coke, in the Fourth Institute, 251, "upon view and examination was found out Mic. 13 Jac. regis [1615], in the case of Sir Thomas Overbury, who was poysoned in a chamber in the Tower on the west part of that old wall." What is on the west of the wall is said to be in London, and on the east in Middlesex. And so Coke, Third Inst. 136. These passages are cited by counsel in 2 Q. B. 789.

London is in what is popularly and generally known as London.[1] In another case a learned author[2] misconceives, apparently, the scope of a Maryland case. "The courts," he remarks, "have refused, more or less capriciously, to take judicial notice of . . . [among other things] the meaning of a printer's private mark to an advertisement, thus, 'Oct. 13, 4t,' as indicating the date and term of publication;" and he cites Johnson *v.* Robertson, 31 Md. 476. But in reality the court, in that case, was declining not merely to notice the meaning of this expression, but to infer from the use of it that a certain advertisement *actually was published* on the date named, and three times afterwards; and to do this where the question was as to the meaning of the record, in determining whether a mortgage had been properly foreclosed. Finally, a case may be mentioned under this head,[3] where a hotel-keeper, now bankrupt, had hired his furniture from a furniture dealer. Upon his becoming bankrupt the furniture was claimed for the creditors as having been left in the credit and disposition of the bankrupt; but the dealer claimed on the ground that the custom of letting furniture to hotel-keepers without passing the title to it was established and generally known. The court, in considering whether they could take notice of this without proof, drew attention to the fact that the real question was not as to the mere existence of the custom, but whether it had existed so long and been so extensively acted on that ordinary creditors of the hotel-keeper, "the wine merchant, the spirit merchant, the brewer, the ordinary tradesman of his town, were likely to know that it exists."

Without going further into detail, enough has now been said to accomplish my purpose, — that of indicating the place in our law of the subject of judicial notice, and of pointing out and illustrating its main features.

James B. Thayer.

CAMBRIDGE.

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[1] Wharton (Ev. i. s. 339, notes) apparently supposes this last to be the decision, when he says that in this case "the court went to the absurd extreme of nonsuiting the plaintiff because he did not prove that the Tower of London was in the city of London."

[2] Wade on Notice (2d ed.), s. 1417. Mr. Wade has a useful collection of cases, and I am indebted to him for several references.

[3] *Ex parte* Powell, 1 Ch. Div. 501.